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Before the

SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

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Mr. Chairmen and members of the Committee, thank you for the opportunity to testify on the recall of Bridgestone/Firestone tires on Ford light trucks and sport utility vehicles (SUVs). I am Clarence Ditlow, Executive Director of the Center for Auto Safety (CAS) which is a non-profit organization founded by Consumers Union and Ralph Nader in 1970 but is now independent of both. The Center works to improve vehicle and highway safety and was the consumer group responsible for the recall of 19.5 million Firestone 500 steel belted radials in 1978-80.

Although there are many similarities between the Firestone 500 and the Firestone/Ford tire failures, there is a key difference -- the role of the vehicle on which the tires are mounted. In the Firestone 500 recall, there were more tires and complaints (14,000 then versus 1,400 today) but fewer deaths (41 then versus 88 and rising today). The primary vehicle in which Firestone ATX, ATX II and Wilderness tire tread separations and deaths have been associated is the Ford Explorer, an SUV which has been marketed as a passenger car. Although the Explorer meets essentially the same standards as passenger cars (albeit on a delayed schedule) there are no standards on rollover and only a weak standard on roof strength for rollover protection. The Explorer is the worst kind of vehicle on which to put a bad tire. A tread separation or other tire failure can lead to a fatal rollover. A tire made for an SUV like the Explorer should have an extra margin of safety built into it like a nylon ply because the consequences of failure can be so bad.

As the tragic toll of 88 known deaths and 250 injuries continues to climb and more information is added to the public record, it becomes clearer and clearer that both Ford and Firestone knew more earlier but failed to act until there were too many complaints, deaths and injuries to conceal Firestone tire failure on Ford Explorers from public attention.

Firestone and Ford Early Knowledge Show Companies Covered Up Defect

Emerging information show that both Ford and Firestone had early knowledge of tread separation in Firestone tires on Ford Explorers and other Ford vehicles but at no point informed the NHTSA or the

American public. To the contrary, the companies concealed information on the lethal combination of Firestone tires on Ford Explorers. It is not coincidental that these two companies have been assessed the two largest fines in NHTSA's history -- \$500,000 in 1978 against Firestone over the 500 steel belted radial and \$425,000 in 1999 against Ford for concealing defective ignition switches that shorted and started fires.

Product liability lawsuits were filed in the early 1990's on Explorer rollovers caused by Firestone tire failures. Lawsuits settlements and discovery contained confidentiality agreements and document protective orders so information on tread separation on Firestone tires causing rollovers on Ford Explorers could be concealed. NHTSA began receiving consumer complaints in 1990-93 and provided Ford and Firestone with summaries of all such complaints as part of its standard policy. In 1996, Arizona state agencies confronted Firestone about tread separations, particularly in hot weather, in Firestone steel-belted radials. In 1998, Ford began receiving complaints on Firestone tire failures on Explorers in other countries. That same year, State Farm Insurance informed NHTSA that it had received 21 damage claim reports on Firestone radial failures on Ford Explorers dating back to 1992. In late 1999, Ford began to replace Firestone tires on Explorers in other countries but failed to notify NHTSA despite a Ford internal memo showing both Ford and Firestone concerned about the duty to report this to NHTSA.

Covering up defects to avoid recalls is profitable for manufacturers even if they get caught by NHTSA. The worst case is they get caught and pay a token fine which is more than offset by the money they save in a delayed recall which always has a lower completion rate. If they don't get caught by NHTSA and the defect never becomes public, auto companies save hundreds of millions of dollars in recall costs at the expense of public safety and lives.

All manufacturers, conceal information from NHTSA and the public whether it's by secrecy agreements in product liability lawsuits or by withholding information directly from NHTSA. Mitsubishi was recently caught concealing consumer complaints through a double record keeping system. Volvo was fined \$17,000 this year for not providing dealer bulletins to NHTSA as required by the Vehicle Safety Act. Volvo got caught only because one of the bulletin it withheld was on Joan Claybrook's Volvo. Toyota was fined for concealing fuel tank defects. Honda was fined for concealing seat belt warranty claims and not doing a recall until NHTSA began an investigation. Chrysler is under investigation for concealing fuel rail

defects in its LH models. GM concealed the most lethal defect in NHTSA's history -- side saddle gas tanks on 1973-87 pickups that burned to death over 800 people -- for over 20 years through confidential settlements that virtually all the trucks were beyond the 8-year statute of limitation for mandatory recall by the time NHTSA caught up to GM. If manufacturers get beyond the 8-year limit and there is no recall, the maximum fine is \$1,000 (adjusted for inflation) per withheld document. If they get caught in time to do a recall, then the maximum fine is \$1,000 per vehicle or tire which should have been recalled earlier capped at \$800,000 (adjusted to \$925,000 for inflation). Strictly peanuts. In the case of Ford which was fined \$425,000 in the 8 million vehicle ignition switch recall, the fine came to a nickel a car.

Cover Up Is a Culture at Ford Motor Company

When it comes to concealing defects and violations of federal and state laws, cover up is a culture at Ford Motor Company. By concealing defects Ford profits by avoiding costly emission and safety recalls. Its vehicles pollute and its consumers ride at risk of highway crashes, deaths and injuries. In the early 1970's the Environmental Protection Agency fined Ford twice for cheating on emission tests. In one case, the Department of Justice filed a criminal complaint against Ford that resulted in a record \$7 million fine of which \$3.5 million was an unprecedented criminal fine against an auto company for false reporting of emission information to the government.¹ In that case, Ford kept a double set of book with the correct one for internal use and a false one for the US government, much the same as Mitsubishi did on consumer complaints.

In the late 1970's, the Federal Trade Commission sued Ford for conducting secret warranties on engine and transmission problems.² In the late 1980's, Ford withheld documents from the National Highway Traffic Safety Administration during investigations on stalling in Ford vehicles to avoid recalls.² In 1999, NHTSA reached a settlement which required Ford to pay a \$425,000 penalty for its coverup and failure to timely recall million of vehicles with defective ignition switches that set parked vehicles on fire.³ In 1998,

1. Department of Justice Press Release Announcing Settlement in United States v Ford Motor Co., Feb. 13, 1973.

2. In the Matter of Ford Motor Co., 96 FTC 362 (1980).

3. Letter from Frank Seales, NHTSA Chief Counsel, to Jay D. Logel, Office of Chief Counsel, Ford Motor Co., Jan. 26, 1998.

4. Settlement Agreement Between Ford Motor Co. & NHTSA, March 11, 1999.

the Environmental Protection Agency again fined Ford, this time \$7.8 million in total payments including a \$3.5 million fine, for cheating emission standards by illegally installing emission control defeat devices on its vehicles.⁴ No other auto company holds such a widespread reputation for lawlessness over the years. And this doesn't even consider the infamous exploding Ford Pinto which resulted in a criminal indictment against company. Even though Ford was narrowly acquitted in the Pinto criminal case, a model corporation would not come close to the edge of breaking the law.

California Court Uncovers Ford's Latest Cover Up -- Stalling In 14 Million Vehicles

During the 1980's, NHTSA conducted five investigations into stalling in Ford vehicles. During those investigations, Ford withheld documents from NHTSA that would have shown a common cause of stalling -- failure of the Thick Film Ignition (TFI) module mounted on the distributor when its temperature rises above 125EC and cuts out, causing the vehicle to stall on the highway. There are over 14 million vehicles still on American roads today that suffer from the same readily-correctable design defect that can cause the engine to stop abruptly and unexpectedly, at any time and at any speed, leaving the driver without power-assisted steering or brakes and the vehicle disabled. Vehicles with the distributor mounted TFI module have a 9% higher fatal crash rate than those with a different module system.

Ford Motor Company has known about this problem since it began, yet it has concealed it from consumers and government regulators for well over a decade. Just as in Firestone tires on Ford Explorers, a prime instrument in Ford's cover up is secrecy agreements in product liability lawsuits. Over 900 product liability lawsuits have been filed against Ford on these vehicles with protective orders and confidential settlement agreements entered in many.

In a landmark decision on August 29, 2000, in *Howard v. Ford Motor Co.*, (Case No. 763785-2, Alameda County Superior Court, California State Judge Michael Ballachey announced he would order the recall of 1.8 million 1983-95 Ford vehicles in California with defective ignition modules that fail and cause dangerous stalls on highways. Judge Ballachey's ruling is the first court order of a recall in the United States outside NHTSA. In a stinging indictment of Ford Motor Co., Judge Ballachey found:

Ford withheld responsive information from NHTSA that it was obligated to provide. [P. 5] It was not for Ford to decide what "safety" meant, or what levels of warranty returns

5. Department of Justice Press Release, June 8, 1998.

obligated it to report to the EPA. Ford's responsibility was to respond to legitimate government inquiries with appropriate information so that an independent evaluation could determine the presence or absence of a problem. [P. 6] Ford failed to meet its obligations to report safety related defect information to relevant governmental agencies and, by so doing concealed vital information related to vehicle safety from the consuming public. This fraudulent concealment. . . constitutes a violation of both Civil Code sections 1770(a)(5) and (7). [P. 8]

The problem is caused by the thick film ignition ("TFI") modules, a key ignition-system component that Ford installed in more than 22 million vehicles it manufactured and sold in the 1983 through 1995 model years. The TFI module regulates the electrical current that fires the air-fuel mixture in each of the engine's cylinders. To reduce costs, Ford installed the TFI on the distributor, one of the hottest locations under the hood. But because the TFI module is sensitive to heat, its mounting location creates an inordinate propensity for the TFI module to fail due to thermal stress. Making the problem even more insidious is its phantom nature. A TFI module can fail on an intermittent basis when hot, then function again when the engine cools, without leaving a trace of physical evidence that the TFI module had failed.

Rather than bearing the expense of moving the TFI module to a cooler location away from the engine—a solution that Ford engineers recommended to management for years—Ford decided to employ a less costly solution: to leave the module on the distributor, but make it last long enough to function during the warranty period, thereby forcing consumers to bear the cost of post-warranty failures that Ford knew would continue to occur in large numbers. As a result, over **13 million** replacement TFI modules (which are designed to last for the life of the vehicle without maintenance or repair) have been sold to consumers at a cost of nearly **\$2 billion**.

Despite an extraordinary number of complaints from consumers, Ford managed to conceal the TFI problem from government regulators. From 1983 through 1989 the National Highway Traffic Safety Administration (NHTSA) conducted **five** separate investigations into stalling complaints by Ford customers. In response to these investigations, Ford concealed what it knew about the TFI problem and persuaded NHTSA to close each investigation without taking action. As a result of the class action, NHTSA opened an investigation in 1997, in which it concluded that Ford had withheld key documents during earlier investigations. By then, the 8-year statute of limitations on NHTSA's authority to order a recall had expired, preventing NHTSA from taking any meaningful enforcement action.

Ford continues to deny that TFI-related stalling causes a safety risk. According to Ford, TFI failure causes the vehicle to buck, hesitate, and experience other “driveability” symptoms that provide a warning that the TFI module is about to fail. But Ford took the exact opposite position when it attempted to excuse its failure to report to the Environmental Protection Agency and the California Air Resources Board over 1 million TFI modules (which EPA and CARB deem “emissions-related” components) that were returned under warranty. In direct contradiction to Ford’s contention that TFI module failure does not pose a safety risk because TFI-induced bucking and hesitation provides plenty of warning, Ford claimed that TFI module failure cannot affect air quality because such failure occurs suddenly and without warning.

Having concealed the true nature and scope of the TFI defect from NHTSA, from EPA, and other regulatory agencies, Ford then used its bargaining power to keep secret the information about the TFI defect in the only other context in which the truth could air: private civil litigation. Given the intermittent, phantom nature of the TFI problem, few people ever discovered that TFI failure was the cause of their injuries, and even fewer sued because of it. When personal-injury plaintiffs did discover what Ford knew about the problem, Ford paid millions of dollars in settlements requiring lawyers to return hot documents, remain silent about what they learned from those documents, and refrain from assisting others in similar litigation against Ford. Just as in Firestone tires on Ford Explorers, the TFI product liability cases against Ford involve tragic injuries. In Phan v Budget Rent a Car & Ford Motor Co., there were two deaths, one quadriplegic and four other injuries when a 1990 Mercury Sable stalled at highway speeds.

In the recall of Ford Explorers for Firestone tire tread separations, Ford President & CEO Jacques Nasser has repeatedly told the American public that “Your Safety Is Our Top Priority.” Yet in Howard v Ford Motor Co., Ford told the court it didn’t know what safety was. As Judge Ballachey observed after hearing the testimony of top executive including its former CEO Harold Poling, its former Vice Chairman Louis Ross and Vice Presidents Robert Transou and Helen Petrauskus among others:

Ford’s dissimulation reached its nadir in the testimony of Bob Wheaton, Ford’s witness designated as most knowledgeable about safety issues when he insisted that “safe is too subjective” and denied knowledge of any “written definition of what safe is within Ford Motor Company.” Other Ford executives were similarly evasive when pressed on the

question of whether or not a failed TFI module, under any circumstances, presented an unreasonable risk of safety. [P. 5].

Yet the case law on safety defects is very clear in establishing a per se theory of failure of any component which can lead to loss of control or mobility or fire which requires showing only that such a critical component failed and that there need not be any crashes, injuries or deaths, just the unreasonable risk or crashes, injuries or deaths. The leading case on defects under the Vehicle Safety Act is *United States v. General Motors*, 518 F.2d 420 (DC Cir. 1975), which involved the recall of 200,000 GM pickups for Kelsey-Hayes wheel failures. NHTSA opened the investigation based on a report of a single failure from Ralph Nader and ultimately showed a failure rate of under 0.2%. The US Court of Appeals decision upholding the recall established the key requirements for recalls:

- Non de minimis number of failures in use which normally will not be a substantial percentage of components produced.
- Function of failure rate and severity of consequences
- Ordinary owner abuse such as tire under inflation must be anticipated by manufacturer.
- Need not show any deaths or injuries

Why Didn't NHTSA Learn About Firestone/Ford Earlier

Tire defects are difficult to discover because so few consumers complain about them and because existing crash data bases are not detailed enough to identify them. When CAS initiated its efforts on the Firestone 500, we received no more than 100 tire complaints per year compared to 15,000 vehicle complaints. NHTSA is no different than CAS and receives very few tire complaints compared to vehicle complaints. To compound matters, few of the consumers who do complain provide the crucial tire identification number located on the inside side wall or even the size and model of tire. CAS goes back to consumers for such information but can no longer do so in the case of complaints in NHTSA's data base because NHTSA keeps their identity confidential.

NHTSA should have opened an investigation in 1998 when State Farm provided information on the 21 claims because the agency often opens a defect investigation on as few as two complaints as this Committee has noted in the past. Rather than being low, the 21 State Farm claims is almost astronomical. NHTSA needs to cast a broader net on tire complaints because so few come into the agency and because the consequence of tire failure can be so catastrophic compared to other defects. If NHTSA doesn't have

the authority to compel information on foreign recalls, then it should be given that authority by Congress.

Legislative Recommendations

The biggest single problem in the National Traffic and Motor Vehicle Safety Act is that it has no teeth if a manufacturer covers up a defect. As shown above, Ford Motor Company is a recidivist when it comes to covering up defects and avoiding recalls. The best way to make Ford and other auto and tire companies obey the law is to put criminal penalties into the law which the industry successfully lobbied against when the Safety Act was passed in 1966.

A particular dilemma with tire recalls is that a manufacturer has no obligation to replace a tire for free if it is more than 3 years old. With radial tires that last 50,000 miles or more, this limit should be repealed. If a manufacturer conceals a defect until the statutory period for free repair or replacement expires, they can get away without a recall. In cases of concealment, the statutory limit on free replacement and repair should be tolled. Moreover, the statute does not provide for reimbursement where a consumer pays for replacement or repair prior to a recall. Congress should remedy that by providing for reimbursement in the statute.

The Firestone/Ford recall of 6.5 million tires to date shows another problem in the recall system -- the shortage of critical safety components such as these tires in large recalls. If parts and tires are unavailable from the recalling manufacturer, then the public rides at risk until replacements become available for their vehicles. CAS is aware of at least 5 deaths in rollover accidents involving Firestone tire tread separation on Ford Explorers since the initial recall was announced. Although Ford and Firestone have announced they would reimburse consumers who buy competitor tires, there is no guarantee they will do so. Indeed, Firestone rescinded its offer until a Kentucky court issues an order prohibiting it. The Safety Act should be amended to give NHTSA the authority to order replacement and repair from competitors where there is an imminent safety hazard and the recalling company cannot meet demand.

Since NHTSA failed to implement this Committee's recommendation in 1978 that FMVSS 109 be upgraded, Congress should amend the Safety Act to require NHTSA to upgrade not only FMVSS 109 but also FMVSS 119 with specific direction to determine whether a even more stringent tire standard should be set for SUVs with their higher rollover propensity than passenger cars. This Committee should

also direct NHTSA to reassess its 1981 decision to drop its proposed rulemaking on low tire pressure warning devices.

The Safety Act should be amended to provide criminal penalties for knowing and willful violations of safety standards and refusal to recall in line with FDA and CPSC authority and in removing the ceiling on civil penalties under the Safety Act to be in line with the Clean Air Act which has no ceiling for violation of vehicle emission standards. Other needed legislative changes include.:

- Repeal the statutory limit on recalls
- Toll the statute of limitation where auto and tire companies conceal defects
- Give NHTSA the authority to order replacement and repair from competitors where there is an imminent safety hazard and the recalling company cannot meet demand.
- Provide for reimbursement of repairs and replacements made prior to recall.
- Require NHTSA to upgrade not only FMVSS 109 but also FMVSS 119 with specific direction to determine whether a even more stringent tire standard should be set for SUVs with their higher rollover propensity than passenger cars. This Committee should also direct NHTSA to reassess its 1981 decision to drop its proposed rulemaking on low tire pressure warning devices.

These legislative recommendation are designed to prevent another public safety crisis like the Firestone tires on Ford Explorers from ever happening again. But for now, the single most important thing to be done is for Ford and Bridgestone/Firestone to recall all ATX, ATX II and Wilderness tires regardless of size and plant where made.